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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-1504

DONALD R. McGEE,

Petitioner,

vs.

RAILROAD RETIREMENT BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

JOHN C. HOYT
Attorney for Petitioner
320 First Avenue North
P.O. Box 2807
Great Falls, Montana 59403
Tel. (406) 761-1960

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

Petitioner, Donald R. McGee, prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit filed on the 3rd day of January, 1977, in the proceeding entitled *Donald R. McGee, Appellant, vs. Railroad Retirement Board, Appellee,* No. 76-2453.

On February 2, 1977, a petition for rehearing was denied.

CITATION TO OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit is printed in Appendix "A" attached hereto. The decision of the Board is printed in Appendix "B" attached hereto.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered on January 3, 1977, and a Petition for Rehearing was denied on February 2, 1977. The jurisdiction of this Court is invoked under Title 45 USC §231g and 28 USC §1254 (1).

QUESTIONS PRESENTED

1. This petition presents the question of whether there was, in fact, substantial evidence under the law to support the decision of the Railroad Retirement Board denying petitioner a disability annuity as provided by 45 USC §231a (2) (1) (v) and the Board promulgated rule made pursuant to authority granted to it by Section 10 (b) 4 of the 1937 Act (45 USC §228j(b)4.) As set forth in 20 CFR 208.17 (a).

2. Whether the United States Court of Appeals for the Ninth Circuit failed to function as a court of review of an adverse decision of the Board as provided by Section 8 of the Railroad Retirement Act of 1974 (45 USC §231g).

STATEMENT OF THE CASE

Petitioner McGee was an employee of the Burlington Northern, Inc., when he sustained serious permanent and disabling injuries to his neck, low back and left knee when struck from behind at night by a long steel handle protruding outward from an open door of a boxcar being pushed by a locomotive, which accident occurred on November 4, 1971, at which time petitioner was under the age of sixty years of age and had completed more than ten, but less than twenty years of creditable service with the railroad. The Railroad Retirement Act provides

that individuals in this category whose permanent physical or mental condition is such that they are unable to engage in any regular employment are entitled to disability annuities under the Act. 45 USC §231a.

McGee filed application for disability annuity and attempted to represent himself at every administrative level through the final determination by the Railroad Retirement Board.

The record before the Board consists of various medical reports from treating or examining doctors and portions of a transcript of testimony in an FELA trial which pertained to the disabilities of McGee.

The Board made its determination that McGee was not disabled so as to be entitled to a disability annuity. An appeal was taken to the United States Court of Appeals for the Ninth Circuit which made its order as set forth in Appendix "A" attached hereto which order merely stated that: "The decision of the Railroad Retirement Board in this case being supported by substantial evidence, it is affirmed."

FACTS

There was no live testimony before the Board and its decision was based upon the exact same cold record which the Ninth Circuit was asked to review. Ordinarily the Board would listen to live testimony, observe the demeanor of witnesses and be in a position of advantage over an appellate or reviewing court, but not so here.

After the initial hospitalization and convalescence McGee was seen by the following doctors:

Dr. John R. Corkery, Jr.—9-22-72 (his family doctor)
Dr. John R. Maxwell—10-16-72 (chest x-rays)

Dr. Milo Harris—10-17-72 (radiologist)
Dr. Alexander P. Greer—10-19-72 (examining doctor for the Board)
Dr. James P. Dunlap—10-20-72 (examining doctor for the railroad)
McGee made his initial application for annuity disability benefits—9-18-72

The Board relied entirely upon excerpts from the initial application of McGee and portions of medical reports from the above named doctors and a report from a non-examining clinical psychologist, Dr. Helen Wilson, which will hereafter be discussed. On the basis of the foregoing the Board determined that McGee was not disabled to the degree necessary to qualify for a disability annuity.

McGee continued to have severe symptoms after October, 1972, and finally in June, 1973, submitted to various diagnostic procedures including a neuromuscular electrodiagnosis, a complete myelogram of both the lumbar and cervical spine which showed mild spondyltic ridging at C4-5 followed by a cervical discogram which showed unusual distribution anterior about the fourth interspace and that at the third interspace there was accumulation which extended posteriorly to the right suggesting there may be disc degeneration. The doctors who performed the discogram commented further that there was more than a normal amount received at the sixth interspace level.

Thereafter McGee moved to Montana from Spokane, Washington, where he resided until the early fall of 1973 where he has been under treatment by Doctor Donald G. Fletcher since that time.

The Board relied entirely upon the early medical reports prior to the diagnostic procedures just outlined and

chose to ignore the statement of Doctor Greer, the Board's own examining doctor. He stated that McGee should be institutionalized because he showed evidence of paranoia and would be an ideal candidate for rehabilitation in an institutional situation where he should have group and individual psychiatric therapy along with his physical medicine. This statement and diagnosis is not controverted in the record.

Dr. Fletcher stated under oath that McGee had severe cervical problems, low back problems and a seriously damaged knee with damage particularly to the weight-bearing portion thereof with extensive ongoing degeneration with much pain, swelling and inability to use the leg and that all of these injuries are permanent.

The conclusion of Dr. Fletcher which again is not controverted after the early 1972 examination is that *McGee can perform only some sedentary type of work if he would be in a position where he could work his own hours, at his own speed, and under circumstances that were favorable to him.*

The foregoing was the complexion of the medical evidence considered by the Board.

The Board sent the file to a psychologist at Eastern Montana College in Billings, Montana, Dr. Helen Wilson, and asked her to review the file and to give her opinion as to whether there were any jobs McGee was capable of performing and reasonably might be expected to obtain and whether these jobs exist in the region where he lives or in other regions of the country.

Dr. Wilson did not state that McGee was capable of performing any gainful employment and acknowledged that he should be allowed to change from one activity to another as comfort and needs dictate. She then listed

nine occupations that "can be suggested" from the information contained in the Dictionary of Occupational Titles, Volumes I, II and the Supplement which were:

Taxicab or bus dispatcher
Truck foreman
Sales or repair of recreational equipment
Parking garage or lot foreman (supervisor)
Recreation-facility attendant
Airplane dispatch clerk
Golf course ranger or starter
Maintenance crew foreman in many industries
Watchman in any industry.

The Dictionary of Occupational Titles used by Dr. Wilson lists approximately sixty thousand different job titles in the United States from which she suggested the nine set forth above.

The foregoing is believed to be a fair analysis of the record considered by the Board and which should have been reviewed by the United States Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING WRIT

1. The Order of the United States Court of Appeals for the Ninth Circuit filed January 3, 1977, printed in Appendix "A" strongly suggests a failure of the Court to review the record of the Railroad Retirement Board or to apply the appropriate law.

2. McGee is entitled to his disability annuities under the facts contained in the record and the application of established principles of law. It is important that administrative agencies and lower federal courts be reminded that these rights are not lightly to be cast aside.

ARGUMENT

Much of the governing processes in this country are handled by various federal agencies. The rights intended by Congress, often as interpreted by the federal courts, can and many times are absolutely crucial to the persons involved. This is particularly true when one is concerned with the rights of a disabled worker. This Court must be aware that it is difficult for an individual disabled worker to obtain legal counsel to carry an adverse decision of a Board through the federal appeal processes and finally to this Court through the medium of a writ of certiorari when the odds are overwhelming that the writ will not be considered.

In this case, however, there are no smoldering constitutional issues of importance for this Court to consider. We strongly feel that McGee received a most unfair decision from the Board which decision is violative of rights granted to him by Congress and the Board's own promulgated rules and the legal decisions affecting both.

We feel even more strongly that the United States Court of Appeals for the Ninth Circuit failed in its function as a court of review. This is understandable because at first blush the issue is relatively unimportant in that it would appear to affect only the rights of one injured railroad worker, but in view of the complexion of the Order of the United States Court of Appeals for the Ninth Circuit it would appear to give the Railroad Retirement Board and other boards a carte blanche to oppression, discrimination and capriciousness when a court of appeals which is mandated by Congress to review the record and decision of a Board appears to fail totally in that function by issuing a one sentence order that "The decision of the Railroad Retirement Board in this case

being supported by substantial evidence, it is affirmed" followed by the citing of two cases which only inferentially can be considered on point.

The real issue before the Board and the Ninth Circuit was whether a person who is so disabled that he can do no work except "some sedentary type work if he were in a position where he could work his own hours, at his own speed and under circumstances that are favorable to him," because "that person cannot sit long, stand long or do anything for any period of time and is in constant pain and distress" describes a person who is entitled to disability annuity benefits or not. The evidence in the record supposedly reviewed by the Ninth Circuit disclosed that the foregoing was uncontroverted, and that being the issue before the Ninth Circuit, the Ninth Circuit should have said either such a person is or is not entitled to disability annuities and give the reasons therefor.

McGee has at all times contended that he is entitled to disability annuity as provided by 45 USC §231a (2) (1) (v) and the Board promulgated rule pursuant to authority granted by Section 10(b)4 of the 1937 Act (45 USC §228j(b)4.) effective in February, 1966, which states:

> "An individual shall be deemed to be permanently disabled for work in any regular employment if he has a permanent physical or mental condition, as that term is defined in §208.10, and he is because of such condition unable to *perform regularly, in the usual and customary manner, the substantial and material duties of any regular and gainful employment which is substantial and not trifling, with any employer, whether or not subject to the act.*" (20 CFR 208.17(a)) (Emphasis Supplied)

McGee also contends that he is entitled to review by the Ninth Circuit Court of an adverse decision of the Board under Section 8 of the Railroad Retirement Act of 1974 (45 USC §231g) and that the Court should make its decision on the issues instead of by an Order which said:

> "The decision of the Railroad Retirement Board in this case being supported by substantial evidence, it is affirmed. *Colange v. Railroad Retirement Board,* 410 F.2d 11, 12 (9th Circ. 1969); *Lowe v. Railroad Retirement Board,* 294 F.2d 115, 116 (9th Circ. 1961); 45 USC §231g; 45 USC §355(f)."

The *Colange* case relied upon by the Circuit Court involved the determination of the meaning of the term "spouse" defined in Section 2(f) of the Railroad Retirement Act (45 USC §228b(f)). That Court held that there was substantial evidence that the petitioner had not satisfied one of the three alternative conditions necessary for her to qualify as a spouse in order for her to receive an annuity under that section of the Act.

The *Lowe* decision concerned an application to receive unemployment benefits under the Railroad Unemployment Insurance Act (45 USC §351-367). The Board in *Lowe* ruled that under the regulations, 20 CFR §327.15, petitioner had not sufficiently shown that he was making reasonable efforts to obtain work. He had failed to show that he was willing and ready to work and that he was "available for work" under Section 1(k) of the Railroad Unemployment Insurance Act. The applicant had applied for social security benefits at the same time and had stated in his application for such benefits that he was disabled and unable to work. Based on that statement of the applicant, that Court ruled that the Board's decision was not arbitrary and had a reasonable basis in the law.

The outcome was obvious, because he could not qualify for railroad unemployment insurance benefits while he was disabled and unable to work.

Colange involves totally different sections of the Railroad Retirement Act than those involved in McGee's case. *Lowe* does not even involve the Railroad Retirement Act, but rather the Railroad Unemployment Insurance Act. The petitioner fails to comprehend how the Circuit Court could properly rely on these decisions as a basis for its Order affirming the Board's decision.

The petitioner herein has never argued that the law is incorrect, but feels strongly that the Circuit Court overlooked the factual points framing the issue necessary to determine whether the decision of the Board was in error. It is McGee's position that in determining whether or not there was "substantial evidence" to uphold the order of the Board, this Court must review the facts in the context of the entire record and accept as facts those matters not controverted. The points raised by petitioner predicated upon the facts contained in the record did not even receive cursory treatment in the Circuit Court's decision, but rather the Court chose to entirely avoid the issues raised by petitioner. The petitioner can only conclude after reading this decision that the Court failed to review the record to determine whether there was, in fact, "substantial evidence" to justify the decision of the Board.

It has been conceded that McGee can no longer perform work for the railroad. The burden of proving that he is capable of engaging in regular employment, which is not of a trivial or trifling nature, therefore shifts to the Board. *Dvorak vs. Celebrezze,* 345 F.2d 894 (C.A. 10 1965).

The Board used the statement of psychologist Dr. Helen Wilson that McGee could "pursue" the occupations listed on page 6 above with totally no explanation or connecting facts to explain either what these jobs require or how a person with McGee's disabilities and background could perform the same. Obviously a paraplegic could perform at least some of these suggested occupations.

Contrary to the conclusion of the Board the claimant does not have the burden of negativing every possible job opportunity. *Dvorak vs. Celebrezze*, 345 F.2d 891 (C.A. 10 1965). A person does not have to be totally helpless in order to qualify for a disability annuity. On the contrary, Congress specifically provided that annuitants who qualify under the disability section such as McGee may earn $200.00 a month or $2,400.00 a year. 45 USC §231a(4).

CONCLUSION

For the reasons stated above it is not just important to McGee, but important to all persons whose fate and future rests within the discretion of a Board that this Petition for Certiorari should be granted.

Respectfully submitted,

JOHN C. HOYT
Attorney for Petitioner
320 First Avenue North
P.O. Box 2807
Great Falls, MT 59401

APPENDIX "A"
ORDER
NINTH CIRCUIT COURT

No. 76-2453
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
DONALD R. McGEE

Appellant,

vs.

RAILROAD RETIREMENT BOARD

Appellee.

Appeal from:
Railroad Retirement Board

Before:
BROWNING and CHOY, Circuit Judges, and WILLIAMS,* District Judge.

The decision of the Railroad Retirement Board in this case being supported by substantial evidence, it is affirmed. *Colange v. Railroad Retirement Board,* 410 F.2d 11, 12 (9th Cir. 1969); *Lowe v. Railroad Retirement Board,* 294 F.2d 115, 116 (9th Cir. 1961); 45 U.S.C. §231(g); 45 U.S.C. §355(f).

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*The Honorable David W. Williams, United States District Judge for the Central District of California, sitting by designation.

APPENDIX "B"
DECISION
RAILROAD RETIREMENT BOARD

RAILROAD RETIREMENT BOARD

Railroad Retirement Act
Claims Appeal Docket No. 1517

Appeal of:
Donald R. McGee, R.R.B. No. A-534-22-5108

This is an appeal from the decision of the appeals referee which sustained the determination of the Bureau of Retirement Claims (the Board's initial adjudicating unit) that appellant is not entitled to a disability annuity under the Railroad Retirement Act of 1937, 50 Stat. 307, as amended (45 U.S.C. 228a et seq.), hereinafter called the Act.[1]

Appellant filed an application for a disability annuity on September 18, 1972, giving his date of birth as October 31, 1929. According to appellant, he has completed approximately three years of college. He was in military service from June 4, 1947 to December 3, 1948, as a surgical technician. He stated he worked in the railroad industry from July 14, 1953 to November 4, 1971, for Burlington Northern, Inc., where he was last employed as a conductor-brakeman. Appellant claims he became disabled for work in his regular railroad job and for any other kind of regular work on November 4, 1971, because of a fractured knee, a depressed fracture of L-1, injury to the sacro-lumbar region, and whiplash to the cervix with numbness in the little finger and ring finger of the left hand. Board records show he has 181 months of railroad service.

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1 Subsequent to the filing of the application in this case, the Railroad Retirement Act was substantially amended, effective January 1, 1975, but no change was made in the language of the disability provision set out or referred to herein which governs whether or not an employee is disabled for purposes of the Act.

The Act contains only one provision, Section 2(a)5, for the award of annuities to individuals who, like appellant, are under 60 years of age and have completed more than 10 but less than 20 years of creditable service. Section 2(a)5 provides annuities for otherwise qualified

> *Individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.*

On September 7, 1965, appellant was examined by a physician for the Great Northern Railway Company (now Burlington Northern Inc.), and was found to be 49 pounds overweight and to have a blood pressure reading of 170/100. On November 4, 1965, his employer removed him from service as a conductor-brakeman because of hypertension and obesity.

Appellant was examined by Dr. W.A. Nerud on May 2, 1969. His report indicates that appellant was complaining of pain in the low back area and that this was aggravated by prolonged standing in one position, lifting or bending. Dr. Nerud reported the following findings:

> FINDINGS OF EXAMINATION: No demonstrable motor, reflex or sensory deficit of either extremity. Straight leg raising, as such, is essentially negative. There was pain described on extremes of motion in the lumbosacral spine area. There was no demonstrable pain in the region of left fibular head.
>
> DIAGNOSIS: 1. Well healed fracture proximal left fibula.
>
> Degenerative and osteoarthritic changes of the lumbosacral spine.

On November 4, 1971, appellant sustained an injury while working, and was taken to Mid-Valley Hospital where his left knee was x-rayed. The x-ray report stated:

> There is a fracture line across the proximal end of the tibia. There is a component of this that extends vertically through the internal plateau. A fragment, measuring about 10mm in diameter has been separated from the rest of the plateau by about 1mm. There is also a non-displaced fracture across the proximal end of the fibula.

Appellant was referred to Holy Family Hospital in Spokane, Washington, for treatment.

The records of Holy Family Hospital indicate appellant was admitted on November 5, 1971, with a comminuted fracture of the left tibial plateau. An open reduction and internal fixation with a Webb bolt was performed, and a cast was applied. He was discharged on November 13, 1971, to be followed on an outpatient basis.

By letter dated February 28, 1972, Dr. Dale D. Popp stated that appellant had been followed since the accident on November 4, 1971, with cast changes as necessary. He had examined appellant on February 21, 1972, and found gradual improvement so far as the knee was concerned.

Appellant was able to flex the knee above a right angle. Dr. Popp indicated he found a slight valgus deformity in the left knee as compared to the right, but stated it was minimal. Appellant was not having any marked pain in his knee at the time of the examination. His back was tender in the lumbar area. Straight leg raising on the left bothered him at approximately 40 degrees. Reflexes were active and equal. There was no definite weakness noted in dorsiflexion of the foot or

large toe. Motion of the cervical spine was minimally restricted and appellant complained of pain when rotating his head and neck to the left. Dr Popp stated that it was doubtful that appellant would be able to return to a job that required a lot of walking or climbing.

Appellant was again admitted to Holy Family Hospital on April 8, 1972, following an automobile accident. The hospital's records show that he had multiple fractures of the left ribs and a 30% compression fracture of the first lumbar vertebra. He also suffered a contusion of the left shoulder and of the sternum. Appellant was treated with a hyperextension brace and was discharged improved on April 14, 1972.

In a letter of October 5, 1972, Dr. Dale Popp reported the findings of four examinations of appellant. The first was performed on March 21, 1972. At that time, appellant was complaining of pain in his left posterior hip and back and in the region of his left knee. He was also having trouble turning his head to the left and was experiencing numbness and tingling in the fourth and fifth fingers of the left hand. Dr. Popp stated that he planned to do a myelogram because of appellant's persistent complaints relative to his lumbar area with sciatic type distribution of pain; however, before this was accomplished, appellant was involved in the automobile accident on April 8, 1972. Following appellant's release from Holy Family Hospital, he was examined on May 9, 1972. X-rays at that time showed progress in the healing of the compression fracture of L-1. Appellant was not complaining of pain in the area of the fracture, but he continued to complain of pain in his lower back. He also complained of some symptoms relative to the left knee. On July 10, 1972, appellant was again experiencing difficulty with his lower back. Dr. Popp noted a slight gibus in his back in

the area of the fracture. His forward bending was restricted with some evidence of muscle spasm. He had sciatic pain with straight leg raising on the left. The ankle jerk was absent on the left. He was able to walk on his heels and toes. There was some tenderness noted in the lower lumbar region. Appellant was next examined on August 10, 1972. Dr. Popp's letter states that he continued to have complaints associated with his lower back. He again noted a slight gibus formation in the region of the compression fracture of L-1. There were evident spasms in the lower lumbar region on forward bending. Appellant was tender to pressure in the L-4-5 area, particularlly on the left. There was a very minimal valgus deformity of the left knee. Dr. Popp stated that appellant would be unable to return to continuous gainful employment as a brakeman for the Railroad.

On September 22, 1972, appellant was examined by Dr. John R. Corkery, Jr., his personal physician. Dr. Corkery's report shows that appellant was 71 inches tall and weighed 255 pounds. His blood pressure was 170/118 and his heart was enlarged. He had a 10% loss of motion of the left knee. Dr. Corkery made the following diagnoses:

1. Obesity
2. Hypertension with cardiac hypertrophy
3. Spinal osteoarthritis with generalized degenerative changes
4. Painful, deformed left knee

On October 16, 1972, the Board arranged for appellant to be examined by Dr. Alexander P. Greer. Dr. Greer's report stated:

> On examination, temperature was 98.2 degrees, pulse 80/min., respirations 20/min., blood pressure

188/133, 71" tall, 278# dressed, 271# undressed. His palms are warm and sweaty, and moderately thickened skin is present, but they are not truly caloused. He shows no abnormalities of ENT, specifically there are only grade I hypertensive angiopathy, and no hypertensive retinopathy. By the time I examined him, his blood pressure was 150/105, with no difference comparing the upper extremities. There was no pulse delay to the lower extremities. Hearing and vision appeared to be normal. Examination of the neck showed no abnormalities. He ventilated his lungs well, with good diaphragmatic and thoracic expansion. Heart tones were well transmitted, there were no murmurs. There was no palpable enlargement. Abdominal examination showed the scar of surgery on the left ureter. There were no abnormal masses or organs. Genitalia are normal male. There was no abnormality of the prostate. Straight leg raising could be performed without symptoms. He had full ROM of all joints in the lower extremities. Tendon reflexes were symmetrically active. He had heavily muscled calves and thighs. There was no asymmetry. There was no abnormality of sensation, although he did complain of subjective paresthesia and numbness involving the ring and little finger of the left hand. In regards to his posture, he did show an increased lordotic curve in the lumbar spine.

Electrocardiogram showed normal sinus rhythm at 75/min. PR interval 0.14. QRS interval 0.08. Mean QRS anis 0 degrees. It was entirely within normal limits.

In conclusion, then, Mr. McGee is obviously litigation minded, and well aware of the privileges and

benefits of an injured workman who has been injured on the job. His obesity is a reflection of abnormal eating habits. His hypertension is labile, and uncomplicated by left ventricular hypertrophy, retinopathy, or cardiomegaly. It is totally unrelated to his accident. I was unable to find any objective evidence of a significant back problem at this time, although subjectively, he has an abundance of symptoms. By history, he gives a good history for gout, which certainly should be under treatment. I suspect that treatment has been offered. I think that it is an objective fact of significance that he takes no medicine for pain.

The Board arranged for appellant to be examined on October 17, 1972, by Dr. James P. Dunlap, an orthopaedic surgeon. Dr. Dunlap's report stated, in part, as follows:

> On examination he flexes forward to bring his fingertips six inches from the floor. Extension, lateral motion, and rotation in the low back are carried out satisfactorily. Heel and toe walk are performed well. Cervical range of motion is normal in flexion, extension, lateral motion, and rotation. The upper extremity range of motion is carried out well. Normal strength is present. Normal reflexes and sensation are present. Sensation is intact over the scalp, face, and neck areas. Facial musculature is intact. There is a long scar on the lateral aspect of the left knee and a small scar on the medial aspect of the left knee. He complains of altered sensation in the lateral aspect of the left calf distal to the scar. Reflexes are intact in the lower extremities. Sensation is intact in other areas. There is one inch atrophy of the left thigh as compared to the right, and a half inch

atrophy of the left calf as compared to the right. Leg lengths are equal. There is instability of the lateral collateral ligament of the left knee as compared to the right. The left knee is in a slight amount of valgus as compared to the right knee. There is crepitation in the joint on manipulation which is ill defined. There appears to be some evidence of chondromalacia. He lacks ten degrees of full flexion in the left knee as compared to the right. There appears to be some increase in joint fluid of the left knee as compared to the right. Medial collateral ligaments and crutiate ligaments appear to be intact. Circulation in the lower extremities is normal. Strength in the feet and ankles is normal and range of motion in the feet and ankles is normal as is range of motion in the hips. X-rays taken at my request in the office of Drs. Harris and Associates of the cervical spine, lumbar spine, and left knee, show in the cervical spine no evidence of old or recent bony injury. There are very minimal arthritic changes present. There is no evidence of intervertebral disc space narrowing or disc degenerative change. X-rays of the lumbar spine shows an old healed anterior compression fracture of the body of L-1 with an anterior vertebral body height loss of approximately 30 percent. There is a droplet of radiopaque material noted in the subdural space secondary to the old myelographic study. No other abnormalities are noted in the lumbar spine except for slight narrowing at L-5 S-1. X-rays of the left knee show a healed fracture of the lateral tibial plateau with a tibial bolt transfixation present. There appears to be slight increase in joint fluid. There is slight widening of the lateral tibial plateau. No gross degenerative or arthritic changes are noted.

CONCLUSIONS: Insofar as this man's general physical condition is concerned he has complaints in the back which I feel are secondary to the fracture of the lumbar spine at L-1 with residual anterior vertebral body height loss. He has complaints of intermittent neck pain and headaches which are related apparently to nervousness and tension. There are no objective physical findings. There is no loss of motion, and no neurological changes in the upper extremities are found at this time on examination. He has residual disability in the left knee secondary to a healed tibial plateau fracture with laxity of the lateral collateral ligament, increased joint fluid, and evidence of chondromalacia of the patella. The complaints in the left knee are supported by the physical findings at this time. I know of no further treatment that would be of benefit.

A report dated July 3, 1973, from Dr. George W. Bagby, appellant's personal physician, stated:

> A follow-up on this man to indicate that most of his procedures have been carried out. His cervical and lumbar myelogram were not remarkable. His discogram would indicate that the C-4 on 5 is the main problem in his neck and reproduced the pain down into his left hand in the fourth and fifth digits. The C-4 on 4 disc was pathologic to a lesser degree.
>
> The most tangible evidence that there is something wrong in the lumbar region is that the perispinal muscle testing on the EMG studies showed evidence of L-5 root involvement on the left. This is reasonably strong evidence that a root is involved but Dr. Morrison tells me that it is impossible for him to know whether he is at the proper root. In other

words, it could be the L-4 or the S-1 root that is involved.

The patient feels grating of his left patella and this is a source of considerable discomfort in his left lower extremity as well.

He has headaches on his left side that he feels is involved with sinus trouble. I can't tell whether this is part of his cervical syndrome or not.

The way I left it with the patient was to lose 50 pounds or more since anything that follows would be definitely helped by his losing weight. I referred him to Dr. Habel to evaluate his headaches and sinuses. He will see me in September to consider some of these surgical procedures and the lumbar disc of his left patella should be considered first since this is his major problem. He may realize that his cervical problem is more important at a later date and will want those discs removed also.

Appellant was examined by Dr. Dan W. Habel on July 10, 1973. His report stated that the entire ear, nose and throat examination was normal as were sinus x-rays. Dr. Habel indicated that the pain distribution which appellant described did not fit injury to a single nerve trunk, which caused him to believe it was probably more non-organic than organic.

In a letter dated May 14, 1975, Dr. Donald G. Fletcher stated:

> This patient is being treated for disability resulting from injuries received in 1971, and is unable to perform his duties as a brakeman.
>
> He does have permanent disability in terms of future employment.

In appealing the decision of the appeals referee, appellant noted that the referee had not obtained a transcript of the court record of his lawsuit against the Burlington Northern Railroad in which he received an award of damages for a personal injury; therefore, a copy of the transcript was requested. Testimony at the trial of Dr. Donald G. Fletcher, appellant's personal physician, revealed that he first examined appellant in December 1972, and that he had seen him on several occasions since that time for follow-up treatment of the injuries sustained in 1971. Dr. Fletcher presented x-rays of appellant's left knee which he stated showed extensive degenerative changes as evidenced by spurring, deterioration of the weight-bearing surfaces, and honey-combing of the patella. X-rays of appellant's lumbar spine showed deterioration of the fifth lumbar disc space and narrowing of the bony surfaces, posteriorally, between the first segment of the sacrum and the first lumbar vertebra. X-rays of the cervical spine were essentially normal; however, Dr. Fletcher stated that appellant had loss of the sensory portion of the ulnar nerve of the left arm which is compatible, to some degree, with injuries to the seventh and eighth cervical nerve roots. He also stated that he performed a gout test which was positive. Dr. Fletcher advised that appellant could do sedentary work in a position where he could work his own hours, at his own speed, and under circumstances that were favorable to him.

In addition to the testimony of Dr. Fletcher, appellant testified that his left knee is unstable and he has difficulty walking on uneven surfaces and up and down steps. He stated he can walk well on level ground, but his knee swells if he walks for very long. He also stated that he has constant discomfort as a result of the injuries to his low back.

Appellant's entire file, including the transcript of the court record of his lawsuit, was forwarded to a vocational consultant, Dr. Helen Wilson of Billings, Montana, who was asked to determine whether there are any jobs appellant is capable of performing, taking into consideration his physical and mental capacities, age, educational background, training and experience. Dr. Wilson's report, dated August 4, 1975, gives a review of information contained in the file concerning appellant, his interests, and work history. She then states:

> The vocational level which he reached demands, among other abilities, that of being able to supervise and coordinate the activities of others in actual job duties to the achievement of a particular goal according to instructions which could be in schedule or diagram form. He had the ability to interpret technical drawings or blueprints and to perform arithmetic, algebraic, and geometric procedures in standard practical situations.

According to the medical reports, he can sit, stand, walk, and drive as long as no such activity has to be maintained for a prolonged length of time. Furthermore, the recommendation is that he be allowed to change from one activity to another as comfort need dictates. With his qualifications and interests, several possible occupations can be suggested.

> Taxicab or bus dispatcher
> Truck foreman
> Sales or repair of recreational equipment
> Parking garage or lot foreman (supervisor)
> Recreation-facility attendant
> Airplane dispatch clerk
> Golf course ranger or starter
> Maintenance crew foreman in many industries
> Watchman in any industry

> The list could be extended. Briefly, the fact that a person with the abilities and interests that this man has demonstrated should declare himself as completely disabled and useless for the rest of his life seems incredible. Please inform me if further research is needed. The sources of information in this report come from the consultant's clinical knowledge and experience as well as the Dictionary of Occupational Titles, Vols. I, II, and the Supplement.

The Board's district office in Billings, Montana, contacted the State Employment Service in Great Falls, Montana, and was told that all of the jobs mentioned by Dr. Wilson would be available in the Great Falls area.

Before making a decision on appellant's claim, the Board sent a copy of the vocational consultant's report to appellant for his review and comments. In a letter dated August 22, 1975, appellant stated that the vocational consultant relied on the trial transcript to distort his situation and that perhaps she had not been provided with his entire file. About the vocational consultant's statement that he could be a starter at a golf course, appellant said most golf courses in Montana do not have starters; and when they do, it is only for three months out of the year.

FINDINGS AND CONCLUSIONS

The Board finds that the evidence of record does not establish that appellant's physical or mental condition is such that he is unable to engage in any regular employment.

The appellant's principal complaint is that he is disabled for work because of a fractured knee and injuries

to the cervical and lumbar regions of the spine. He states his knee is unstable and swells when he walks very long. He has constant discomfort in his back and neck and experiences frequent headaches. He further states that as a result of his injuries he developed gout and hypertension.

It appears that appellant has had a long history of gout and hypertension, but the evidence does not suggest a finding that these conditions are so severe as to be disabling. Dr. Greer stated that appellant gave a history of gout but noted he was taking no medication for it. Dr. Fletcher testified that appellant has a history of gout and that a test for gout was positive. He indicated that this condition was poorly controlled by medication. In his report of September 22, 1972, Dr. Corkery stated that appellant's blood pressure was 170/118 and his heart was enlarged. He gave a diagnosis of hypertension with cardiac hypertrophy. On October 16, 1972, Dr. Greer initially found appellant's blood pressure to be 188/130; however, later in the examination it had dropped to 150/105. He stated that appellant's hypertension was labile, and uncomplicated by left ventricular hypertrophy, retinopathy, or cardiomegaly. Appellant's electrocardiogram was entirely within normal limits. There is no indication that there has been any attempt to control appellant's hypertension with medication.

On examination of appellant, Dr. Greer found no objective evidence of a significant back problem. According to the report of Dr. Dunlap, x-rays of appellant's lumbar spine show slight narrowing at L-5 — S-1. X-rays of the cervical spine revealed very minimal arthritic changes. Appellant's personal physician, Dr. Fletcher, stated that there was deterioration of the fifth lumbar disc space as well as narrowing at L-5 — S-1. He testified that x-rays of the cervical spine were essentially negative, although

appellant's complaint of numbness in the fourth and fifth fingers of his left hand led him to believe there was injury to the seventh and eighth cervical nerve roots. A report from Dr. Bagby stated that a cervical and lumbar myelogram was not remarkable. A discogram suggested that there might be disc degeneration of the cervical spine. An electromyogram showed evidence of L-5 root involvement. Although there is some evidence of degenerative disc disease and minimal arthritic changes, there is no evidence of any disabling limitation of motion of either the cervical or lumbar spine.

Appellant's most significant physical impairment as established by the evidence is the damage to his left knee. Appellant's knee is unstable on uneven ground. There is some increase in joint fluid as compared to widening of the lateral tibial plateau. However, appellant has lost only 10% of limitation of motion of the knee and according to Dr. Dunlap, there are no gross degenerative or arthritic changes. Appellant walks normally and uses no supportive device.

Appellant complains of constant pain and discomfort of his back and left leg. The Board does not question that appellant experiences pain from his impairment; however, it finds that the extent of the pain and dysfunction involved is not so substantial nor is it so persistent as to render him totally disabled. Although appellant's daily activity has been affected in that he can no longer engage in the strenuous, physical activities that he previously enjoyed, he is still able to swim 20 to 60 minutes a day, 3 to 4 days a week. He walks to the post office and back, a distance of 4 blocks. Appellant works in the yard 15 to 20 minutes a day and does the grocery shopping for his wife. He continues to drive an automobile.

Appellant is disabled in that he can no longer perform manual labor; however, the Board finds that he can do light sedentary jobs of the type mentioned by the vocational consultant. These jobs are available in the economy.

The Board concludes that it has not been established that appellant is permanently disabled for all regular employment and he is not, therefore, entitled to a disability annuity.

DECISION

The decision of the appeals referee is affirmed.

/s/ James L. Cowen
JAMES L. COWEN, Chairman

/s/ Neil P. Speirs
NEIL P. SPEIRS, Member

/s/ Wythe D. Quarles, Jr.
WYTHE D. QUARLES, JR., Member

Supreme Court, U. S.
FILED
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No. 76-1504

In the Supreme Court of the United States

OCTOBER TERM, 1977

DONALD R. McGEE, PETITIONER

v.

RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

DALE G. ZIMMERMAN,
General Counsel,

EDWARD S. HINTZKE,
Assistant General Counsel,

STEVEN A. BARTHOLOW,
General Attorney,
Railroad Retirement Board,
844 Rush Street,
Chicago, Illinois 60611.

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OPINIONS BELOW

The court of appeals rendered no opinion (see 549 F. 2d 807). The opinion of the Railroad Retirement Board (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1977. A petition for rehearing was denied on February 2, 1977. The petition for a writ of certiorari was filed on April 29, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board's determination that petitioner is not entitled to a disability annuity under the Railroad Retirement Act of 1937 is supported by substantial evidence.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2(a) of the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U.S.C. 228b(a), provides, in pertinent part:

> The following-described individuals, if they shall have been employees on or after the enactment date, and shall have completed ten years of service, shall * * * be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 1(a) (but with the right to engage in other employment to the extent not prohibited by subsection (d)):
>
> * * * * *
>
> 5. Individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

20 C.F.R. 208.17(a) provides:

> An individual shall be deemed to be permanently disabled for work in any regular employment if he has a permanent physical or mental condition, as that term is defined in §208.10, and he is because of such condition unable to perform regularly, in the usual and customary manner, the substantial and material duties of any regular and gainful employment which is substantial and not trifling, with any employer, whether or not subject to the act.

20 C.F.R. 208.10(a) provides in pertinent part:

> [T]he term "permanent physical or mental condition" means a physical or mental impairment that can be expected to result in death or has lasted, or can be expected to last for a continuous period of not less than 12 months.

STATEMENT

Petitioner filed an application for a disability annuity on September 18, 1972. The application stated that petitioner was born on October 31, 1929, and worked in the railroad industry from July 14, 1953, to November 4, 1971, for Burlington Northern, Inc., where he was last employed as a conductor-brakeman. Petitioner claims he became disabled for work in his regular railroad job and for any other kind of regular work on November 4, 1971, because of a fractured knee, a depressed back fracture, and other injuries (Pet. App. B, p. 1).

On October 29, 1975, on the basis of an extensive medical record, the Railroad Retirement Board determined that petitioner was not entitled to a disability annuity under Section 2(a)5 of the Railroad Retirement Act of 1937 (45 U.S.C. 228b(a)5) because his permanent physical or mental condition had not been shown to be such that he was unable to engage in any regular employment within the meaning of that section (Pet. App. B). The court of appeals affirmed, holding that the decision of the Board was supported by substantial evidence (Pet. App. A).

ARGUMENT

Petitioner contends (Pet. 7-11) that the Board's finding of nonentitlement is incorrect and that the court of appeals failed to review the record to determine whether the Board's finding is supported by substantial evidence. These contentions concern the application of settled rules of law[1]

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[1]Section 8 of the Railroad Retirement Act of 1974, 88 Stat. 1343 (45 U.S.C. (Supp. V) 231g), pursuant to which this action was brought, incorporates the judicial review provisions of the Railroad Unemployment Insurance Act, 52 Stat. 1100, as amended (45 U.S.C. 355(f)),

to a particular set of facts and do not warrant further review by this Court. Moreover, the court of appeals' decision is correct.

As the Board's decision indicates (Pet. App. B), the Board considered numerous medical reports submitted in this case. This evidence shows that although there is some damage to petitioner's left knee, the damage is not of itself, or in combination with other factors, of sufficient severity to be considered as disabling from all regular employment. Petitioner's impairments prevent him from engaging in strenuous, physical activities. But as the Board found (Pet. App. B, p. 13), that does not mean that petitioner is "unable to engage in any regular employment" within the meaning of Section 2(a)5 of the Act.

The record contains the opinion of a vocational consultant, Dr. Helen Wilson, that petitioner is able to engage in substantial gainful employment. Based upon a review of the other evidence in the case, Dr. Wilson concluded (Pet. App. B, pp. 12-13) that given his physical condition, interests and qualifications, petitioner "has potential for many occupations and vocations," and is capable of performing a number of light sedentary jobs (see Pet. App.

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which in turn provides that "[t]he findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive." The law is well settled that a decision of the Railroad Retirement Board regarding entitlement to disability benefits under the Railroad Retirement Act is not to be set aside on judicial review if it is not based on an error of law. *E.g., Jenkins* v. *Railroad Retirement Board*, 458 F. 2d 1359 (C.A. 5); *Copeland* v. *Railroad Retirement Board*, 327 F. 2d 348, 350 (C.A. 5); *Aldridge* v. *Railroad Retirement Board*, 285 F. 2d 759, 760 (C.A. 5); *Bertamini* v. *Railroad Retirement Board*, 440 F. 2d 278, 280 (C.A.D.C.).

B, p. 16).[2] This opinion, as well as the other medical opinions discussed in the Board's decision (Pet. App. B, pp. 1-11), amply support the findings that petitioner's impairments are not such that he is unable to engage in any regular employment and thus that he is not disabled under the Act.[3] See *Kyle* v. *Cohen*, 449 F. 2d 489 (C.A. 4); *Gotshaw* v. *Ribicoff*, 307 F. 2d 840 (C.A. 4); *Harvey* v. *Richardson*, 451 F. 2d 589 (C.A. 9); cf. *Colange* v. *Railroad Retirement Board*, 410 F. 2d 11, 12 (C.A. 9); *Lowe* v. *Railroad Retirement Board*, 294 F. 2d 115, 116 (C.A. 9); *Marr* v. *Railroad Retirement Board*, 206 F. 2d 47 (C.A. 4); *Harris* v. *Richardson*, 450 F. 2d 1099, 1102 (C.A. 4); *Grant* v. *Richardson*, 445 F. 2d 656 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DALE G. ZIMMERMAN,
General Counsel,

EDWARD S. HINTZKE,
Assistant General Counsel,

STEVEN A. BARTHOLOW,
General Attorney,
Railroad Retirement Board.

JULY 1977.

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[2] Dr. Wilson's report further states (Pet. App. B, p. 13): "the fact that a person with the abilities and interests that this man has demonstrated should declare himself as completely disabled and useless for the rest of his life seems incredible."

[3] There is no basis for petitioner's contention that the court of appeals did not consider the record. The court is not required to give a detailed explanation of its decision, and its disposition of the case by a *per curiam* affirmance does not show that it did not properly consider the case.